SUPREME COURT U. S.

MAY 3 1968

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1392

GERALD RONALD GUTHRIE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction in the United States District Court for the Western District of North Carolina.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A); the supplemental opinion and judgment of the United States Court of Appeals for the Fourth Circuit (R. Vol. II, pp. 28-31, Appendix B).

JURISDICTION

On December 5, 1967, the United States Court of Appeals for the Fourth Circuit entered an opinion and judgment affirming, in part, and remanding, in part, petitioner's conviction in the United States District Court for the Western District of North Carolina (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A). The supplemental opinion and judgment of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction was entered on March 4, 1968 (R. Vol. II, pp. 28-31, Appendix B).

On April 1, 1968, the Chief Justice of the United States entered an order extending the time for filing a petition for writ of certiorari in this cause until May 3, 1968.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Circumstances of the Case

Petitioner was tried and convicted in the United States District Court for the Western District of North Carolina on an indictment (R. Vol. I, p. 13) charging him and a co-defendant with a violation of Section 912 of Title 18 of the United States Code. On Appeal, petitioner questioned the

sufficiency of the indictment to charge an offense under the statute and the sufficiency of the Court's instructions to the jury in stating the essential elements of the offense charged. Petitioner also claimed error in the Court's failure to grant petitioner's motion for a severance and the Court's comments, in its instructions to the jury, on the petitioner's failure to testify and his assumed contentions had he testified. During the pendency of the appeal, it was brought to the attention of the Court that during the trial an FBI agent who had testified for the Government was observed conversing with a juror during a recess in the proceedings.

In an opinion entered on December 4, 1967 (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A), the Court of Appeals affirmed petitioner's conviction as to the questions raised on appeal, and remanded the case to the District Court with directions that a full hearing be had as to the aforementioned conversation between a juror and an FBI agent during the trial. A full hearing was had and the Court of Appeals affirmed the finding of the District Court that petitioner was not prejudiced by the conversation in a supplemental opinion and judgment entered on March 4, 1968 (R. Vol. II, pp. 28-31, Appendix B).

The Questions

1. Is "intent to defraud" an essential element of an offense under part (1) of 18 United States Code, Section 912 and, if so, is an indictment which fails to allege such "intent" fatally defective?

2. Is "intent to defraud" an essential element of an offense under part (1) of 18 United States Code, Section 912 and, if so, does the failure of the trial court to give an

instruction as to such element constitute plain error requiring reversal?

3. Was the refusal of the trial judge to grant petitioner's motion for a severance such an abuse of discretion as to constitute plain error requiring reversal?

4. Did the trial judge, in stating what he assumed would be the petitioner's contentions had the petitioner testified, abridge petitioner's constitutional right to remain silent?

5. Does the giving of an instruction having no applicability to the offense charged constitute plain error requiring reversal?

6. Is that portion of 28 United States Code, Section 753 requiring that all proceedings had in open court in criminal cases be recorded mandatory and, if so, is the failure of the court reporter to record arguments of counsel plain error requiring reversal?

7. Did a conversation between a juror and an FBI agent, who had been seated at counsel table with the prosecution and who had testified against petitioner, during a recess in petitioner's trial constitute official intrusion into the privacy of the jury requiring reversal?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

"* * * nor shall (any person) be compelled in a criminal case to be a witness against himself * * *."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, 18 United States Code

"Rule 7(c). Nature and Contents. The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

"Rule 14. Relief from Prejudicial Joinder. If it appears that a defendant * * * is prejudiced by a joinder * * * of defendants in an indictment * * *, the court may * * * grant a severance of defendants * * *."

"Rule 52(b). Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Title 18, United States Code, Section 912:

"Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Title 18, United States Code, Section 3481:

"In trial of all persons charged with the commission of offenses against the United States * * *, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Title 28, United States Code, Section 753:

"(b) One of the reporters for each such court shall * * * record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court * * *."

STATEMENT OF THE CASE

Petitioner and a co-defendant were tried on an indictment (R. Vol. I, p. 13) which charged:

> "That on or about November 2, 1966, at Charlotte, within the Western District of North Carolina, GERALD RONALD GUTHRIE and ALBERT OTIS HADEN did falsely pretend to be officers and employees of the United States acting under the authority thereof, that is, Federal bank examiners, and did falsely take upon themselves to act as such, in violation of 18 U.S.C. 912."

Both petitioner and his co-defendant made motions for severances which motions were denied by the Court (R. Vol. I, pp. 8-12), whereupon, petitioner and his co-defendant were arraigned and a jury was empanelled.

The government introduced testimony by several witnesses that petitioner's co-defendant had contacted a Mr. Fred Stegall and represented himself to be a federal bank examiner and that at some later date the petitioner had represented himself to be a federal bank examiner to either Mr. Stegall or his wife.

Petitioner did not testify nor did he offer any evidence in his behalf. Petitioner's co-defendant took the stand and testified that he had represented himself as a "state" rather than a "federal" bank examiner. To impress the jury with his candor and credibility, petitioner's co-de-

fendant admitted a life of crime and imprisonment as a professional "con-man."

The court reporter did not record the closing arguments of counsel (R. Vol. I, pp. 193-194).

After being instructed by the Court, the jury returned a verdict of guilty as to both petitioner and his co-defendant (R. Vol. I, p. 220). Sentence was then imposed and petitioner gave notice of appeal (R. Vol. I, p. 231, R. Vol. II, p. 2) to the United States Court of Appeals for the Fourth Circuit.

On appeal, petitioner attacked the sufficiency of the indictment, the sufficiency of the Court's instructions to the jury, the refusal of the Court to grant a severance for trial, and the prejudicial comment by the Court on petitioner's failure to testify during its instructions to the jury. The Court of Appeals affirmed in an opinion entered on December 5, 1967 (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A) holding that "intent to defraud" was not an element of the offense charged and finding the remaining contentions to be without merit.

During the pendency of the appeal, it was brought to the attention of the Court that an FBI agent who had been seated at counsel table with the prosecution and who had testified against petitioner, had engaged in conversation with a juror during a recess in the proceedings. The case was remanded to the District Court with directions that a hearing be held concerning the circumstances and content of such communication. In a supplemental opinion and judgment entered on March 4, 1968 (R. Vol. II, pp. 28-31, Appendix B), the Court of Appeals accepted the finding of the District Court that the conversation was harmless, and petitioner's conviction was affirmed.

REASONS FOR GRANTING THE WRIT

I

An Indictment Which Fails to Allege an "Intent to Defraud" in Charging an Offense under 18 United States Code, Section 912 Is Fatally Defective.

Section 912 of Title 18 of the United States Code, provides:

> "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [1]* acts as such, or [2]* in such pretended character demands or obtains any money, paper, document or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years or both."

The indictment in this case charged:

> "That on or about November 2, 1966, at Charlotte, within the Western District of North Carolina, GERALD RONALD GUTHRIE and ALBERT OTIS HADEN did falsely pretend to be officers and employees of the United States acting under the authority thereof, that is, Federal bank examiners, and did falsely take upon themselves to act as such, in violation of 18 U.S.C. 912."

As against petitioner's contention that the indictment was fatally defective in that it failed to allege an "intent to defraud", the Court of Appeals specifically held that such intent was not an essential element of the offense charged, stating that this conclusion was compelled by the Reviser's note to Section 912. The Reviser's note is as follows:

> "The words 'with the intent to defraud the United States or any person', contained in said section 76 of

*Brackets and identifying numerals added.

Title 18, U.S.C., 1940 ed., were omitted as meaningless in view of United States v. Lapowitch (Lepowitch), 63 S. Ct. 914."

The dilemma thus presented is identical to that in *Honea* v. *United States*, 5th Cir. 1965, 344 F. 2d 798, wherein the question presented was the sufficiency of an indictment charging an offense under part (2) of section 912, where the indictment failed to include an allegation of "intent to defraud." The conclusion reached by the Fifth Circuit is in direct conflict to the opinion here sought to be reviewed.

The decision of this Court in *United States* v. *Lepowitch*, 318 U.S. 702, 87 L. Ed. 1091, 63 S. Ct. 914, held simply that an "intent to defraud" as applied to an offense under part (1) of the statute could be construed to mean an intent to change the course of another's conduct. *Lepowitch* merely defined the meaning of "intent to defraud" as an element of an offense under part (1) of the statute. See *Honea* v. *United States*, supra, wherein it was recognized that the Reviser's note was a gloss and that Congress intended no change in the essential elements of the offense of false personation when it enacted the present Code. Nor does a scrutinous perusal of *Lepowitch* reveal any suggestion that an elimination of "intent to defraud" was indicated or intended.

If the language of the Reviser is construed to mean that, because of the decision in *Lepowitch*, the Revision was eliminating "intent to defraud" in the statute without effecting any change in the substantive law, such construction would be much more in keeping with the intent of the committee responsible for the revisions as indicated by the legislative history thereof. If, on the other hand, the note is construed to compel elimination of "intent to de-

fraud" as an element of an offense under part (1) thereof, as was held by the Fourth Circuit, such construction is then in direct conflict with the decision of this Court in *Morissette* v. *United States*, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240, wherein it was held that "mere omission from Section 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."

The Court of Appeals for the District of Columbia has held that false personation is a common law offense and that, as such, an "intent" is an essential element thereof despite Congressional silence on the subject. *Levine* v. *United States*, D.C. Cir. 1958, 261 F. 2d 747. A similar conclusion was reached by the Court of Appeals for the Fifth Circuit in *Honea* v. *United States*, supra. In *Honea*, the Court attempted to reconcile the omission of "intent" from the statute, with the law applicable to common law offenses, The Court referred to the omission as having occurred in "a structural recodification."

In *Honea*, the Fifth Circuit also referred to the approved forms for indictments under section 912 (See Forms 8 and 9, Federal Rules of Criminal Procedure, Appendix of Forms) as indicative of what the law requires. Though raised in brief, this point was not considered by the Fourth Circuit in its opinion.

The Fourth Circuit, in the opinion here sought to be reviewed, sought to distinguish *Honea* on the grounds that it involved an indictment under part (2) of section 912, whereas the instant case involved an indictment under part (1) of the statute. As to any conflict, the Fourth Circuit declined to follow the Fifth Circuit.

It is submitted that the opinion of the Court of Appeals for the Fourth Circuit here sought to be reviewed is in di-

rect conflict with the intent of Congress in enacting Title 18, United States Code, Section 912; applicable decisions of this Court on the same matter, i.e. *United States* v. *Lepowitch*, supra, and *Morissette* v. *United States*, supra; and applicable decisions of the Fifth Circuit on the same matter, i.e. *Honea* v. *United States*, supra.

It is further submitted that the indictment in this case is fatally defective in that it fails to allege an essential element of the offense sought to be charged. See *Russell* v. *United States*, 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038, and cases cited therein. See also Rule 7(c), Federal Rules of Criminal Procedure.

II

The Failure of the Court to Instruct the Jury That "Intent to Defraud" Was an Essential Element of an Offense under 18 United States Code, Section 912, Was Plain Error Requiring Reversal.

If petitioner is correct in his contention that an "intent to defraud" is an essential element of an offense under 18 United States Code, Section 912, then, irrespective of the sufficiency of the indictment, his conviction is due to be reversed inasmuch as the Court failed to instruct the jury as to this element of the offense charged.

It is well-settled that a failure to instruct the jury as to the essential elements of the offense charged is plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Morissette* v. *United States*, supra.

III

The Denial of Petitioner's Motion for a Severance Was Plain Error Requiring Reversal.

Petitioner and his co-defendant were charged with violating 18 United States Code, Section 912, in a single count indictment (R. Vol. I, p. 13). The evidence showed that on October 12, 1966, petitioner's co-defendant had a conversation with Mr. Fred Stegall wherein he allegedly represented himself to be a Federal bank examiner (R. Vol. I, pp. 32 et seq.). Mr. Stegall testified that petitioner made the same representations to him on November 2, 1966 (R. Vol. I, pp. 52-56).

A review of the proceedings at trial clearly shows that the case was tried as a conspiracy without a conspiracy having been alleged. Though the record is full of instructions regarding the competency of the testimony as to one or the other of the defendants, there was no way that the jury could help but be prejudiced. This is especially true in light of the reference by the Court in its instructions to "they" in stating the contentions of the government (R. Vol. I, p. 209).

The prejudice accruing to petitioner was aggravated and emphasized when his co-defendant took the stand and advanced a defense characterized by the Court of Appeals as "brazen." It was from the lips of petitioner's co-defendant that the most incriminating testimony as to petitioner was elicited. Furthermore, a different set of facts was necessary to sustain the burden of proof as to each of them. The only relationship between petitioner and his co-defendant was the conspiracy which, though not alleged, was proven at trial.

It is submitted that under such circumstances, a denial of a motion for a severance is prejudicial per se and re-

quires reversal as a matter of law. See Rules 14 and 52(b) of the Federal Rules of Criminal Procedure. The writ should be granted to condemn such a departure from the accepted and usual course of judicial proceedings. See *Schaffer* v. *United States*, 362 U.S. 511, 4 L. Ed. 2d 921, 80 S. Ct. 945.

IV

Petitioner's Fifth Amendment Rights Were Abridged When the Court, in Charging the Jury, Attempted to State the Contentions of Petitioner, Who Did Not Testify.

The trial court, after instructing the jury as to the contentions of the Government and of petitioner's co-defendant, made the following statement to the jury:

> "Now, under a recent decision of the United States Court, the Court of Appeals, when one does not go upon the witness stand and give evidence in his own behalf, then you are not permitted to state the contentions of that individual who is up for trial and does not testify, other than to instruct the jury that he has the right to and does rely upon the presumption of innocence, the fact that he can only be convicted if he is when a jury is satisfied of his guilt and beyond a reasonable doubt, and that he has every inherent right to rely upon his plea of not guilty. But in any event, assuming that he would accept the statements of Mr. Haden, his co-defendant, he says and contends that * * *." (R. Vol. I, p. 214).

Petitioner contends that such an instruction constitutes impermissible comment by the Court upon the exercise, by petitioner, of a right guaranteed to him by the Fifth Amendment and Title 28, United States Code, Section 3481. See *Griffin* v. *California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229.

That such comment was plainly prejudicial has been recognized by the Court of Appeals for the Fourth Circuit in prior decisions which were apparently ignored in the Court's opinion of December 4, 1967 (Appendix A).

In *United States* v. *Weir*, 4th Cir. 1965, 348 F. 2d 453, the Court of Appeals for the Fourth Circuit held:

> "We think it plainly prejudicial, when the defendant has seen fit not to testify, for the Court's charge to undertake to present, as in this case, speculatively and perhaps even derisively defenses which the defendant has not tendered. Compare *United States* v. *Harris*, 346 F. 2d 182 (4th Cir. 1965). Such a charge fatally impairs the fairness of a trial. The error cannot be condoned as harmless for there is no way of measuring the degree of harm."

In ignoring its prior decisions on the subject, the Court of Appeals for the Fourth Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and rendered a decision in conflict with the applicable decisions of this Court.

V

The Giving of an Instruction Which Would Authorize a Conviction of an Offense Not Charged in the Indictment Is Plain Error.

Title 18, United States Code, Section 912, contains two separate offenses. *United States* v. *Barnow*, 239 U.S. 74, 60 L. Ed. 155, 36 S. Ct. 19; *United States* v. *Lepowitch*; supra; *Honea* v. *United States*, supra. Despite its recognition of the two offenses proscribed by Section 912 (See Appendix A, note 1), the Court of Appeals for the Fourth Circuit found no merit in petitioner's contention that the trial court erred in charging the jury as to both offenses.

The Court, in charging the jury, read the entire statute verbatim and then paraphrased the statute as to both of the offenses proscribed therein (R. Vol. I, pp. 203-204).

It has long been recognized that instructions which would tend to authorize a conviction if the evidence established a violation of the law, though not charged in the indictment, are prejudicial error requiring reversal under Rule 52(b) of the Federal Rules of Criminal Procedure. *Einziger* v. *United States*, 2nd Cir. 1921, 276 Fed. 905.

It is submitted that the writ should be granted in order to settle the apparent conflict between the opinion of the Fourth Circuit in this case and applicable decisions of the Court of Appeals for the Second Circuit.

VI

The Requirement of 28 United States Code, Section 753(b)(1), That All Proceedings Had in Open Court in Criminal Cases Be Recorded, Is Mandatory and the Failure of the Court Reporter to Record Arguments of Counsel Is Plain Error Requiring Reversal.

Congress, in enacting 28 United States Code, Section 753(b)(1), bestowed upon a defendant in a criminal case, an unconditional and unqualified right to insist upon a full and complete transcript of all proceedings had in open court. The requirements of this statute have been held to be mandatory. *Stephens* v. *United States*, 5th Cir. 1961, 289 F. 2d 308; *Fowler* v. *United States*, 5th Cir. 1962, 310 F. 2d 67; *Parrott* v. *United States*, 10th Cir. 1963, 314 F. 2d 46.

See also *Poole* v. *United States*, D.C. Cir. 1957, 250 F. 2d 396.

The Court of Appeals for the Fifth Circuit held, in *Stephens* v. *United States*, supra, that Section 753(b)(1)

was mandatory in its requirements and that the failure of the Court to observe the terms of the statute necessitated reversal inasmuch as the appellate Court was unable, in the absence of a full and complete transcript, to adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless. In *Fowler* v. *United States,* supra, the Fifth Circuit specifically condemned the local practice of recording closing arguments only on request of counsel. The practice thus condemned was but a slight variation of the practice tacitly approved by the Fourth Circuit in the opinion here sought to be reviewed.

Both of these Fifth Circuit decisions have been distinguished and interpreted by later decisions as holding that the burden of showing prejudice is upon the defendant who claims error in a failure to comply with the statute.

That the failure to record arguments of counsel to the jury is error is apparent inasmuch as Congress has legislated unequivocally upon the subject. As to the effect of such error, there is a hopeless conflict in the applicable decisions of the various Courts of Appeals on the same subject, as well as within the various circuits.

It is submitted that when there has been error in the failure to record closing arguments of counsel, the burden should be cast upon the government to show beyond a reasonable doubt, that such error was without prejudice to a defendant. In other words, the test to be applied in determining whether a defendant was prejudiced by a failure to comply with 28 United States Code, Section 753(b)(1), is the test stated by this Court in *Chapman* v. *California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.

To cast upon a defendant the burden of overcoming the presumption that such error is harmless is contrary

to the decisions of this Court. The record reveals that closing arguments of counsel were not recorded (R. Vol. I, pp. 193-194). Petitioner did not, nor was he given an opportunity to, waive his right to insist upon a complete transcript of the proceedings at his trial.

Petitioner's counsel is not able to determine whether or not the error was without prejudice in this case. Certainly this Court cannot declare a belief that it was harmless beyond a reasonable doubt.

The writ should be granted in order to determine the effect of a failure to comply with the requirements of 28 United States Code, Section 753(b)(1) and whether such error necessitates reversal under Rule 52(b) of the Federal Rules of Criminal Procedure. The writ should be granted in order to place the burden of proof in such circumstances. Is the burden upon the defendant to show that he was prejudiced by the failure to comply with the statute, or is the burden upon the Government to show that the error was harmless beyond a reasonable doubt? See *Chapman* v. *California*, supra.

VII

The Conversation During a Recess in Petitioner's Trial Between a Juror and an FBI Agent Who Had Been Seated at Counsel Table with the Prosecution and Who Had Testified Against Petitioner, Constituted Official Intrusion into the Privacy of the Jury.

While petitioner's case was on appeal, it was brought to the attention of the Court that, during petitioner's trial, an FBI agent was observed conversing with a juror. During the trial, this FBI agent had been seated at counsel table with the District Attorney (R. Vol. I, pp. 30-31). The agent also testified against petitioner (R. Vol. I, pp. 106-133).

The Court of Appeals remanded the case to the District Court with directions to hold a hearing as to whether the

conversation was harmless (Appendix A). A hearing was had and the Court of Appeals accepted the finding of the District Court that the conversation was innocent, unrelated to the case and in no way prejudicial (R. Vol. II, pp. 28-31, Appendix B).

The decision thus rendered is in direct conflict with the decisions of this Court in *Remmer* v. *United States*, 347 U.S. 227, 98 L. Ed. 654, 74 S. Ct. 450; 350 U.S. 377, 100 L. Ed. 435, 76 S. Ct. 425 and *Gold* v. *United States*, 352 U.S. 985, 1 L. Ed. 2d 360, 77 S. Ct. 378.

> "In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matters pending before the jury is, for obvious reasons, deemed presumptively prejudicial * * *." *Remmer* v. *United States*, supra.

The fact that the intrusion was unintentional does not remove the prejudicial effect of the intrusion. *Gold* v. *United States*, supra.

The conversation in this case was between a juror empanelled to determine petitioner's guilt or innocence and the FBI agent who had arrested petitioner and who had investigated and presented the case against him. The establishment of an unwarranted and improper rapport between this FBI agent and a juror is sufficient prejudice to necessitate reversal under the applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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Counsel for Petitioner

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 11,360.

United States of America,
Appellee,

versus

Gerald Ronald Guthrie,
Appellant.

No. 11,368.

United States of America,
Appellee,

versus

Albert Otis Haden,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE. WILSON WARLICK, DISTRICT JUDGE.

(Argued November 6, 1967. Decided December 4, 1967.)

Before SOBELOFF, BRYAN and WINTER, Circuit Judges.

Nelson M. Casstevens, Jr., (A. A. Bailey on brief) for Appellant in No. 11,360; Louis A. Bledsoe, Jr., (Court-appointed counsel) and C. Ralph Kinsey, Jr., (Berry

and Bledsoe on brief) for Appellant in No. 11,368, and Wm. Medford, United States Attorney, (William M. Styles on brief) for Appellee.

SOBELOFF, Circuit Judge:

The legal sufficiency of an indictment for violating 18 U.S.C. § 912 is the primary issue raised by defendant-appellants Haden and Guthrie. That section provides:

> "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [1] acts as such, or [2] in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both."[1]

The evidence showed that Haden, flashing a badge, identifying himself as "Mr. Hunter" and posing as a federal bank examiner, visited Fred Stegall and informed him that an investigation had unveiled that someone at the local bank had misused funds in Stegall's savings account. Ostensibly to aid in the discovery of the embezzler's identity, Haden proposed that Stegall withdraw the balance standing to his credit and turn it over to Haden who promised to redeposit it secretly. In accordance with the arrangement, a "Mr. Williams" (actually defendant Guthrie) appeared at Stegall's home with an official-looking badge, similar to Haden's, to pick up the money. He was handed a dummy package and was then arrested by F.B.I. agents who had hidden themselves in the home and observed the transaction.

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1. Brackets ([1] and [2]) have been inserted in the opinions of courts to clarify the two offenses included in the statute and to facilitate analysis. *See, e.g.*, Honea v. United States, 344 F.2d 798, 800 (5th Cir. 1965).

Haden, on the witness stand, freely admitted that he had engaged in a scheme to defraud Stegall. In fact, he testified that he came to Charlotte to find a victim and selected Stegall because he lived in a nice-looking, well-maintained house. He advanced the brazen defense, however, that he did not represent himself as a *federal* bank examiner because he well knew from his extensive encounters with the federal law that this course would be dangerous. He admitted representing himself as a bank examiner, but one employed by the State of North Carolina, not by any federal agency.[2] Guthrie elected not to take the stand. Both were convicted and prosecute this appeal.

The challenged indictment is as follows:

> "* * * on or about November 2, 1966, * * * GERALD RONALD GUTHRIE and ALBERT OTIS HADEN did falsely pretend to be officers and employees of the United States acting under the authority thereof, that is, Federal bank examiners, and did falsely take upon themselves to act as such, in violation of 18 U.S.C. 912."

The defect the defendants ascribe to the indictment is that it fails to allege expressly that the defendants acted with "intent to defraud."

The question for decision is whether, though the statute is silent as to fraudulent intent, a requirement to allege this must be read into part [1] of § 912.

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2. To persuade the jury that he would not likely have represented himself as a federal officer or employee he testified that he had "been tried and convicted for about 300 things." This was doubtless a piece of hyperbole, but it serves the point he was trying to make, namely that such frankness about his past established the veracity of his defense. It is not surprising, then, that in the face of this extraordinary admission to guide the jury in its task of assessing the defendant's credibility, the jury found the truth on the issue as to the nature of the representations made by the defendants to be as stated by the government's witnesses—the intended victim and the corroborating F.B.I. agents—rather than as claimed by Haden.

As defined in that part of the section, the essential elements of the crime of impersonating a federal official are (a) falsely assuming or pretending to be the official, and (b) "acting as such." We are aware that the statute, as originally drafted, expressly required an "intent to defraud either the United States or any person."[3] But the section was revised and codified in 1948 and in its new form the words of intent were deliberately discarded. The Reviser's note states that "[t]he words 'intent to defraud * * *' contained in section 76 of Title 18, U.S.C., 1940 ed., were omitted as meaningless in view of United States v. Lapowich [Lepowitch] [318 U.S. 702 (1943)]." Regardless of whether the amendment was in fact necessitated by the Supreme Court's holding in *Lepowitch*, Congress accepted the Reviser's view that it was, and accordingly the phrase was excised.

It is an accepted canon of statutory construction that where Congress has advertently changed the legislative language the change must be given effect. This is particularly true when the revision was precipitated by a specific Supreme Court interpretation.

The defendants now ask the court to restore the phrase that was intentionally omitted. So to hold would be contrary to the apparent intent of Congress. It cannot be

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3. Act of March 4, 1909, c. 321, § 32, 35 Stat. 1095, *as amended*, Act of February 28, 1938, c. 37, 52 Stat. 83, *formerly codified* as 18 U.S.C.A. § 76 (1940). (Portions which have been either deleted or modified are in italics.)

"Whoever, *with intent to defraud either the United States or any person, shall* falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or *any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States,* and *shall take upon himself to* act as such, or *shall* in such pretended character demand or obtain *from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States,* any money, paper, document, or *other valuable thing,* shall be fined not more than $1,000 or imprisoned not more than three years, or both."

assumed in these circumstances that Congress deleted an element theretofore regarded as essential without intending to affect the meaning of the statute. While Judge Holtzoff, who assisted in the Revision, declared in the preface of Title 18 U.S.C.A., Vol. 1, p. v, that "[i]n general, with few exceptions, the Code does not attempt to change existing law," the Reviser's note compels the conclusion that this alteration of § 912 constitutes one of the "few exceptions."

We hold, therefore, that "intent to defraud" is no longer an element of a charge under part [1] of § 912, although, of course, the presence of an intent to defraud may be a consideration in determining the gravity of the offense. While it has been stated that "[a]n indictment * * * for a statutory offense * * * may ordinarily be laid in the language of the statute, unless the statute omits an essential element of the offense or includes it only by implication * * *," 4 Barron, *Federal Practice and Procedure* § 1914 and 1964 Supp. § 1914 (Wright ed.), this cannot avail the present defendants, concluding as we do, that a fraudulent intent is not an essential element. It follows that it need not be alleged in the indictment. While there is very little authority elsewhere on this specific question, our own circuit recently concluded, though only by way of dictum, that "an indictment which alleges that the pretended officer 'acted as such' is complete and sufficiently states the first of the two separate offenses defined by the statute." *United States* v. *Leggett*, 321 F.2d 566, 569 (1962). In our view, this conclusion accords with the design of Congress "to protect * * * the dignity, prestige and importance of federal office." *Honea* v. *United States*, 344 F.2d 798, 802 (5th Cir. 1965). It recognizes that the injury to the federal government is occasioned by masquerading and acting as a government official regardless of fraudulent intent.

The rule is that an indictment is sufficient if it clearly sets forth the essential elements of the offense sought to be charged. "The true test * * * is * * * whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Syre* v. *United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34; *Hagner* v. *United States*, 285 U.S. 427, 431." *United States* v. *Debrow*, 346 U.S. 374, 376 (1953).

It is plain beyond doubt that the indictment as drawn fully informed the defendants of the crime with which they were charged so that they could adequately prepare their defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. They can ask no more.

We think that our decision in the instant case is not inconsistent with that of the Fifth Circuit in *Honea* v. *United States, supra*. In that case, the court was concerned only with the adequacy of an indictment under the second offense of § 912,[4] and its holding must be limited accordingly. But, to the extent that there may be any conflict, we respectfully decline to follow *Honea* in the present case.

This court has considered the defendants' remaining contentions and has found them to be without merit. During the pendency of this appeal, however, the defendants filed a motion to remand for a hearing pursuant to Rule 33 of the Federal Rules of Criminal Procedure, to determine whether they were prejudiced by communications,

4. In *Honea*, the Fifth Circuit held fatally defective an indictment *under Part* [2] of § 912 that failed to allege "intent to defraud."

while the court was in recess, between an F.B.I. agent who was a government witness, and a member of the jury that had been impaneled to try the case. Defendant Haden asserts in his motion that when he observed the witness and the juror engaged in conversation, he requested his court-appointed counsel to take appropriate action, but that the request was ignored.

No one disputes that a conversation did take place, but the Government has submitted ex parte affidavits by those involved, attesting that the government witness was not aware that the person with whom he was talking was a juror and denying that they discussed any matter relating to the trial. Nevertheless, this court is of the opinion that the defendants are entitled to have a hearing and an opportunity to cross-examine. This court said in *Holmes* v. *United States*, 284 F.2d 716, 718 (1960), private communications of a court official to members of the jury are

> "* * * an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained. When there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict."

The same is true if the communication with the juror was from a witness, rather than an officer of the court.

The mere submission of ex parte affidavits, without the safeguard of cross-examination, is not an adequate method for determining that the communication was clearly not prejudicial. A hearing is necessary, pending which the appeals will be held in abeyance. For this purpose the case is now remanded to the District Court.

Remanded with directions.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 11,360.

United States of America,
Appellee,

versus

Gerald Ronald Guthrie,
Appellant.

No. 11,368.

United States of America,
Appellee,

versus

Albert Otis Haden,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE. WILSON WARLICK, DISTRICT JUDGE.

(Argued November 6, 1967. Decided March 4, 1968.)

Before SOBELOFF, BRYAN and WINTER, Circuit Judges.

Nelson M. Casstevens, Jr., (A. A. Bailey on brief) for Appellant in No. 11,360; Louis A. Bledsoe, Jr., (Court-appointed counsel) and C. Ralph Kinsey, Jr., (Berry and

Bledsoe on brief) for Appellant in No. 11,368, and Wm. Medford, United States Attorney, (William M. Styles on brief) for Appellee.

SUPPLEMENTAL PER CURIAM:

This case was remanded to the District Court to make inquiry into the circumstances of a certain alleged conversation between an F.B.I. agent, a government witness, and a juror during the trial. .....F.2d ..... The District Court has now held a plenary hearing and found that the conversation was entirely innocent, unrelated to the case on trial and in no way prejudicial. We accept this finding. The appeal, having been held in abeyance, may now be disposed of. The transcript of the hearing and the District Court's findings will be filed among the papers in this court. The judgment below is

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1392

GERALD RONALD GUTHRIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals remanding the case for an evidentiary hearing (Pet. App. A1-A7) is reported at 387 F.2d 569. The *per curiam* opinion (Pet. App. A8-A9) affirming the conviction is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1968. The Chief Justice extended the

time for filing a petition for a writ of certiorari to May 3, 1968, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment charging an offense under the first section of 18 U.S.C. 912, and jury instructions thereon, were fatally defective because they did not specifically raise the issue whether petitioner had impersonated a federal officer "with intent to defraud."

2. Whether, in the circumstances of this case, the trial court committed error by refusing to order a severance.

3. Whether the instructions on the offense charged were plainly erroneous.

4. Whether failure to record closing arguments of counsel, absent any request therefor or showing of prejudice, constitutes plain error.

5. Whether a conversation, found by the courts below to have been unrelated to petitioner's trial, between a government witness and a juror, whom the witness did not know to be such, requires reversal.

6. Whether the trial judge committed plain error in instructing the jury that petitioner did not have to take the stand, but that, if it assumed that he relied upon the defense raised by his co-defendant, that defense would be that he had attempted to impersonate a state, not a federal, bank examiner.

STATUTE INVOLVED

18 U.S.C. 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or office thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

Petitioner and one Albert Haden were tried by jury in the United States District Court for the Western District of North Carolina and were convicted of impersonating a federal bank examiner in violation of 18 U.S.C. 912. On April 12, 1967, petitioner was sentenced to three years' imprisonment and a $1,000 fine.[1] The court of appeals rejected all contentions raised on appeal, but remanded the cause, on petitioner's motion, to determine whether petitioner was prejudiced by a conversation between a juror and an F.B.I. agent who appeared as a government witness. 387 F.2d 569 (C.A. 4). After the district court certified that the evidence indicated conclusively that the agent had been unaware that the person to whom he was speaking was a juror and that no aspect of petitioner's case had been discussed (R. 25), the court of appeals accepted this finding and affirmed, *per curiam* (Pet. App. A8-A9).

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[1] Haden was also sentenced to three years' imprisonment (Tr. 230).

The sufficiency of the evidence is unquestioned. On October 12, 1966, co-defendant Haden, purporting to be "Mr. Hunter", a "Federal bank checker" from the Union National Bank of Charlotte, North Carolina, informed a Mr. Stegall that someone was misusing his savings account and outlined a plan whereby the two of them would trap the individual (Tr. 32-42).[2] Stegall expressed his willingness to cooperate, but he called the F.B.I. after Haden departed (Tr. 43, 45). On November 2, 1966, while F.B.I. agents were at Stegall's home in the course of their investigation, Haden telephoned and told Stegall to withdraw $16,000 in savings from the bank (Tr. 44-48). The agents went to the bank and arranged for a dummy package to be made up (Tr. 106-107). Stegall thereafter went to the bank, picked up the package, and returned home. Within minutes, Haden called. After ascertaining that Stegall had obtained the money, he told him that "Mr. Williams" would be out to pick up the money for him (Tr. 49-51). Shortly, petitioner arrived and identified himself as "Mr. Williams", a "Federal bank checker". He exhibited a badge and written credentials and related that "Mr. Hunter" had sent him. As petitioner took possession of the

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[2] We are informed by the Clerk of this Court that the certified record of the district court proceedings has never arrived from the Clerk of the Fourth Circuit Court of Appeals and has presumably been lost in the mails. We are therefore lodging a copy of the transcript of the trial proceedings (Tr.) as well as of the proceedings at the evidentiary hearing upon remand (H. Tr.). The certified record of proceedings in the court of appeals (R.) is already on file with the Clerk of this Court.

dummy package, he was arrested by the agents (Tr. 52-55, 108-113). A search of petitioner's person incident to his arrest revealed a "safety deposit slip" for $16,000 made out to Mr. Stegall and purportedly signed by the bank director (Tr. 116).

The co-defendant, Haden, testified in his own behalf that he had indeed attempted to bilk Stegall, but denied that he had attempted to impersonate a federal bank examiner. He stated that he and petitioner had asserted that they were from a *state* institution (Tr. 139-166). Petitioner did not testify.

ARGUMENT

1. Petitioner's principal argument here, as in the court of appeals (see Pet. App. A2)—although the theory was never raised in the district court—is that the indictment and the jury instructions were fatally defective in that they failed to set forth in specific language that acting with "intent to defraud" is an essential element of an offense charged under the first clause of 18 U.S.C. 912. His major premise falls, however, for intent to defraud is not something separate and apart from the act of impersonating a federal officer and acting as such. As *United States* v. *Lepowitch*, 318 U.S. 702, 704, indicates, the only facts necessary to establish intent to defraud are that the accused falsely pretends to be a federal officer and thereafter acts as such, thereby causing "the deceived person to follow some course he would not have pursued but for the deceitful conduct." Thus the only operative language necessary to charge the type of

intent subsumed by the statute is the allegation that a defendant "falsely assum[ed] * * * to be an officer * * * of the United States * * * and act[ed] as such." It was with ample justification, therefore, that the 1948 Revisors of the Criminal Code deleted the "with intent to defraud" language as "meaningless" surplusage in light of *Lepowitch*.

Petitioner's reliance upon *Honea* v. *United States*, 344 F.2d 798 (C.A. 5) as establishing a conflict is misplaced. There, the court dealt solely with the second offense set forth in Section 912—that of impersonation of a federal officer and the obtaining of a valuable object as a result. In commenting upon the Revisors' deletion of the words "with intent to defraud" from the statute, the Fifth Circuit stated that with respect to the offense charged under the first portion of the statute, it *agreed* that the words were meaningless when viewed against this Court's decision in *Lepowitch*. (344 F.2d at p. 803). In the instant case, the indictment and the charge to the jury fully and fairly set forth the elements of the offense in terms employing the statutory language. At trial the government established that petitioner had falsely assumed to be a federal bank examiner and that, acting under color of that office, he attempted to obtain unlawfully the funds of another. Nothing more was required under the statute; that conduct was itself fraudulent. The court below, therefore, correctly concluded that petitioner had been properly charged and convicted under the statute.

2. Prior to trial, petitioner's counsel had stated that he did not believe he should represent both de-

fendants, and accordingly separate counsel was appointed for Haden (Tr. 3-5). Petitioner's counsel moved to sever the case on the ground that there would be a considerable amount of evidence admissible against only one defendant (Tr. 10). The United States attorney stated that the two defendants were so closely joined together that it would be not only proper but necessary to try them together (Tr. 11). The court declined to sever the case (Tr. 11).

During the trial the court repeatedly told the jurors, at the appropriate junctures, that testimony with respect to representations made by Haden could be considered only against him (Tr. 37, 38, 40, 43, 47, 50, 51, 67, 70, 72, 73, 76, 79, 81, 87, 89, 90). The evidence against Haden and against petitioner was discrete and readily separable by the jury. The court's further solicitous care that the jury not relate testimony as to Haden's conduct to the question of petitioner's guilt or innocence confirms the conclusion that the exercise of discretion not to sever the defendants was not prejudicial.

In any event, petitioner's argument (Pet. 12) that the jury must have considered against him the testimony about Haden's conversations with Stegall is irrelevant. Although he argues that the "case was tried as a conspiracy without a conspiracy having been alleged," it is well established that, when two persons act in concert, they are co-conspirators, whether or not a conspiracy is formally alleged, and thus the statements made by one in furtherance of the venture may be considered against both. See *United States* v. *Olweiss*, 138 F.2d 798, 799-800 (C.A. 2), certiorari

denied, 321 U.S. 744; *Blue* v. *United States*, 138 F.2d 351, 358 (C.A. 6), certiorari denied, 322 U.S. 736; *Fuentes* v. *United States*, 283 F.2d 537, 539-540 (C.A. 9). Since the independent evidence against petitioner (*supra*, pp. 4-5) clearly justified the conclusion that he was acting in concert with Haden, petitioner received more favorable treatment than was his due when the court repeatedly instructed the jury not to consider against petitioner the conversations between Haden and Stegall.

3. In its final instructions, the trial court read the indictment to the jury (Tr. 197) and thereafter read the entire statute upon which the indictment was founded (Tr. 203-204), inadvertently including in that reading the elements of an offense under the second portion of the statute. The essential elements of the offense with which petitioner was charged—"false impersonation of a federal officer" and "acting as such"—were, however, clearly detailed for the jury. Petitioner cannot complain that the judge went further and described the elements necessary to convict under the second provision of the statute, which actually imposes a more complex burden upon the government, thus making a verdict of guilty less likely. Therefore, the error in instructions, if any, was favorable to petitioner. See *Killian* v. *United States*, 368 U.S. 231, 257-258; cf. *Wood* v. *United States*, 342 F.2d 708, 711-712 (C.A. 8), certiorari denied, 385 U.S. 978; *Michaud* v. *United States*, 350 F.2d 131, 133-134 (C.A. 10).

4. Petitioner asserts that the failure to record the closing arguments of counsel pursuant to 28 U.S.C.

753(b), even in the absence of a request for transcription, automatically compels reversal. Petitioner does not demonstrate, or even suggest, that he was in any way prejudiced by that omission. It is well settled that, absent such a showing, reversal is not required. See, *Edwards* v. *United States*, 374 F.2d 24, 26 (C.A. 10), certiorari denied, 389 U.S. 850; *Stirone* v. *United States*, 341 F.2d 253, 256 (C.A. 3), certiorari denied, 381 U.S. 902; *Burns* v. *United States*, 323 F.2d 269, 270 (C.A. 5), certiorari denied, 376 U.S. 907; *Addison* v. *United States*, 317 F.2d 808, (C.A. 5), certiorari denied, 376 U.S. 905; *Strauss* v. *United States*, 311 F.2d 926, 932-933 (C.A. 5), certiorari denied, 373 U.S. 910.

5. During a recess at trial, F.B.I. Agent Carr spoke with a person who—unknown to him—was a juror in this case. The district court found, after an evidentiary hearing on the matter, that Agent Carr was "wholly unaware" that the person was a juror, that the conversation was a "general one" unrelated to petitioner's case, and that "no harm resulted" to petitioner as a result of that conversation (R. 25). The findings of the district court are amply supported by the evidence (See H. Tr. 4-5, 10, 16, 28).

6. Petitioner also questions a portion of the court's instructions concerning his right not to testify on his own behalf. In order that the instruction may be considered in context, the pertinent portion of the instruction is set forth:

> Now, under a recent decision of the United States Court, the Court of Appeals, when one does not go upon the witness stand and give evi-

dence in his own behalf, then you are not permitted to state the contentions of that individual who is up for trial and does not testify, other than to instruct the jury that he has the right to and does rely upon the presumption of innocence, the fact that he can only be convicted if he is when a jury is satisfied of his guilt and beyond a reasonable doubt, and that he has every inherent right to rely upon his plea of not guilty. But in any event, assuming that he would accept the statements of Mr. Haden, his co-defendant, he says and contends that the badge he had did not indicate that he was a federal employee, he did not falsely assume to be one, and that on the contrary the badge which was offered in evidence as being taken from him on November 2nd by Mr. Carr and the two detectives of the Charlotte police force, that in itself indicates he was a State employee and not an employee of the United States; but, in any event, ladies and gentlemen, you will remember all of the evidence, consider all the evidence, give to these defendants a fair and impartial trial based upon the evidence and the law to the end that if and when your disposition is made it can be said that you did what you thought was right and proper under all the circumstances as may apply to the disposition of a criminal case [Tr. 214-215].

Both earlier in the instructions (Tr. 202) and immediately before the challenged instruction (Tr. 213-214), the trial court advised the jury that it was not to draw any adverse inferences from petitioner's invocation of his constitutional right not to testify. The trial court's additional instruction—to the effect that should the jurors assume that petitioner would adopt

Haden's defense, the defense would be that he had only impersonated a state official—was appropriate in the peculiar circumstances of this case. The only significant factual issue for the jury to resolve was whether petitioner and Haden had impersonated a federal or a state bank examiner. Viewed from this perspective, there is no merit to petitioner's assertion (Pet. 13) that the remarks constituted "impermissible comment by the Court upon the exercise * * * of a right guaranteed to him by the Fifth Amendment * * *."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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